

principled jurists who are committed to following the law and upholding our constitutional rights, and less individuals like Priscilla Owen, Janice Rogers Brown, William Pryor, and Thomas Griffith, conservative ideologues who are not afraid to rewrite our laws to further their political agenda. I can only hope that he will do so in the future, sparing the Senate from endless hours of debate on unqualified, dangerous judges.

Thank you, Mr. President.

#### AGAINST RACE-BASED GOVERNMENT IN HAWAII

Mr. KYL. Mr. President, I rise today to ask unanimous consent that the following analysis of the 1993 Hawaii apology resolution, prepared by constitutional scholar Bruce Fein, be entered into the RECORD following my present remarks.

To be sure, I do not think that the nature of the events that led to the end of the Kamehameha monarchy is relevant to the question whether we should establish a race-based government in Hawaii today. I believe that America is a good and great Nation, and that all Americans should be proud to be a part of it. The United States does not deserve to have its government carved up along racial lines.

Nevertheless, proponents of racially separate government in Hawaii have advanced their arguments for S. 147, the Native Hawaiian Government Reorganization Act, in terms of history. It is thus instructive to take a close look at that history.

[The Grassroot Institute of Hawaii, Jun. 1, 2005]

#### HAWAII DIVIDED AGAINST ITSELF CANNOT STAND—AN ANALYSIS OF THE APOLOGY RESOLUTION

(By Bruce Fein)

##### THE 1993 APOLOGY RESOLUTION IS RIDDLED WITH FALSEHOODS AND MISCHARACTERIZATIONS

The Akaka Bill originated with the 1993 Apology Resolution (S.J. Res. 19) which passed Congress in 1993. Virtually every paragraph is false or misleading.

The opening paragraph declares its purpose as to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii and to offer an apology to "Native Hawaiians" on behalf of the United States for the event that ushered in a republican form of government and popular sovereignty, in lieu of monarchy. The apology wrongly insinuates that the overthrown 1893 government was for Native Hawaiians alone; and, that they suffered unique injuries because of the substitution of republicanism for monarchy. There never had been a race-based government since the formation of the kingdom of Hawaii in 1810, and only trivial racial distinctions in the law (but for discrimination against Japanese and Chinese immigrants). [Footnote: Minor exceptions include jury trials, membership in the nobility, and land distribution. In addition, the 1864 Constitution mandated that if the monarch died or abdicated without naming a successor, the legislature should elect a native Ali'i (Chief) to the throne.] Native Hawaiians served side-by-side with non-Native Hawaiians in the Cabinet and legislature. The 1893 overthrow did not disturb even a square inch

of land owned by Native Hawaiians. If the overthrow justified an apology, it should have been equally to Native Hawaiians and non-Native Hawaiians. Both were treated virtually the same under the law by the ousted Queen Liliuokalani. Moreover, it seems preposterous to apologize for deposing a monarch to move towards a republican form of government based on the consent of the governed.

Paragraph two notes that Native Hawaiians lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language and culture when the first Europeans arrived in 1778. It errantly insinuates that Native Hawaiians are not permitted under the United States Constitution to practice their ancient culture. They may do so every bit as much as the Amish or other groups. They may own land collectively as joint tenants. The paragraph also misleads by omitting the facts that Hawaiian Kings, not Europeans, abolished communal land tenure and religious taboos (kapu) by decree. [See Appendix page 3 paragraphs 2, 3, 4]

Paragraph three notes that a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii. It neglects to mention that the King established the government by conquest and force of arms in contrast to the bloodless overthrow of Queen Liliuokalani. In other words, if King Kamehameha's government was legitimate, then so was the successful 1893 overthrow. [See Appendix page 2 paragraph 1]

Paragraph four notes that from 1826 until 1893, the United States recognized the Kingdom of Hawaii as an independent nation with which it concluded a series of treaties and conventions. But the paragraph neglects to note that the United States extended recognition to the government that replaced Queen Liliuokalani in 1893. It treated both governments as equally legitimate under international law, as did other relations.

Paragraph five notes the more than 100 missionaries sent by the Congregational Church to the Kingdom of Hawaii between 1820 and 1850. But the missionaries did not cause mischief. They brought education, medicine, and civilization to Native Hawaiians for which no apology is due. [See Appendix page 2 paragraphs 2, 3]

Paragraph six falsely accuses United States Minister John L. Stevens as conspiring with non-Native Hawaiians to overthrow the indigenous and lawful Government of Hawaii. The Government, as previously explained, was not "indigenous," but included non-Native Hawaiians. The latter were treated identically with Native Hawaiians and shared fully in the society and governance of the kingdom. Moreover, Minister Stevens, as a meticulous Senate Foreign Relations Committee report (the "Morgan" report) established, remained steadfastly neutral between the contesting political forces in Hawaii in 1893. [See Appendix page 4 paragraph 1]

Paragraph seven falsely indicts Minister Stevens and naval representatives of aiding and abetting the 1893 overthrow by invading the Kingdom of Hawaii and positioning themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government. The "Morgan" report convincingly discredits that indictment. It demonstrated that United States forces were deployed solely to protect American citizens and property. [See Appendix page 4 paragraph 1]

Paragraph eight falsely insinuates that the overthrow of the Queen was supported only by American and European sugar planters, descendants of missionaries, and financiers. The Queen was abandoned by the majority of

Hawaiian residents, including Native Hawaiians, because of her squalid plan to alter the constitution by illegal means to make the government more monarchical and less democratic. At best, the Queen was able to rally but a feeble resistance to defend her anti-constitutional plans. A Provisional Government was readily established and maintained without the threat or use of overwhelming force, in contrast to the force Kamehameha brandished to establish the Kingdom of Hawaii. [See Appendix page 1 paragraphs 1, 2, 3, 4, 5]

Paragraph nine falsely asserts that the extension of diplomatic recognition to the Provisional Government by United States Minister Stevens without the consent of the Native Hawaiian people or the lawful Government of Hawaii violated treaties and international law. The international community in general extended diplomatic recognition to the Provisional Government. That was consistent with international law, which acknowledges the right to overthrow a tyrannical government. The Provisional Government received the consent of Native Hawaiians every bit as much if not more than did King Kamehameha I in establishing the Kingdom of Hawaii by force in 1810. In addition, international law does not require the consent of an overthrown government before extending diplomatic recognition to its successor. Thus, the Dutch recognized the United States of America without the consent of Great Britain whose colonial regime had been overthrown. Similarly, the United States extended diplomatic recognition to the new government regime in the Philippines in 1898 headed by Cory Aquino without the consent of Ferdinand Marcos. Finally, sovereignty in Hawaii at the time of the 1893 overthrow resided in the Monarch, not the people. Native Hawaiian and non-Native Hawaiians alike possessed no legal right to withhold a transfer of sovereignty from Queen Liliuokalani to the Provisional Government. The Queen's own statement, reprinted in the Apology Resolution, confirms that sovereignty rested with the monarch, not the people. She neither asked nor received popular consent for yielding sovereignty to the United States. In any event, Native Hawaiians enjoyed more popular sovereignty than did non-Native Hawaiians. Accordingly, if the diplomatic recognition was wrong, both groups were equally wronged.

Paragraph ten falsely suggests that Queen Liliuokalani yielded her power to avoid bloodshed. She did so because her anti-constitutional plans had provoked popular anger or antagonism. The Queen forfeited the legitimacy necessary to sustain power. Even Cabinet members she had appointed abandoned her and advised surrender. [See Appendix page 1 paragraph 5]

The Queen's statement itself is cynical and false in many respects. She condemns the Provisional Government for acts done against the Constitution, whereas she had provoked her overthrow by embracing anti-constitutional plans for a more monarchical and less democratic government. The Queen falsely asserts that Minister Stevens had declared that United States troops would support the Provisional Government. The Minister insisted on strict United States military neutrality between contending parties. And the Queen audaciously insists that the United States should reinstall her to reign as an anti-democratic Monarch in lieu of a step towards a republican form of government, akin to Slobodan Milosevic's requesting the United States to restore him to power in Serbia after his replacement by a democratic dispensation. [See Appendix page 4 paragraph 2, 3]

Paragraph ten falsely insists that the overthrow of Queen Liliuokalani would have

failed for lack of arms and popular support but for the active support and intervention by the United States. The United States provided no arms to the insurgents. The United States did not encourage Hawaiians to join the insurrection. The United States remained strictly neutral throughout the time period and events that precipitated the end of Monarchy and the beginning of a republic in Hawaii. [See Appendix page 4 paragraph 2]

Paragraph eleven falsely insinuates that Minister Stevens proclaimed Hawaii to be a protectorate of the United States on February 1, 1893 as a coercive action. Minister Stevens had raised the American flag over government buildings at the request of the Provisional Government to deter threats to lives and property. The protectorate was requested, not imposed. The Harrison administration revoked the protectorate soon after, which refutes the Apology Resolution's assumption that the United States government conspired to annex Hawaii.

Paragraph twelve neglects to underscore that Democrat Congressman James Blount on behalf of Democrat President Grover Cleveland conducted an investigation of events that transpired under a Republican administration which both hoped to discredit for partisan political purposes. Blount's findings of abuse of diplomatic and military authority and United States responsibility for the overthrow of the Queen were meticulously discredited by the Morgan report the following year. [See Appendix page 4 paragraph 3]

Paragraph thirteen fails to note that the actions against the Minister and military commander were inspired by the partisan politics of Democrats casting aspersions on the predecessor Republican administration of Benjamin Harrison. [See Appendix page 4 paragraph 1]

Paragraph fourteen misleads by omitting President Grover Cleveland's partisan motivation for attacking the policies of his predecessor, President Benjamin Harrison, and the Morgan report that disproved President Cleveland's tenacious chronicling and characterizations of Queen Liliuokalani's overthrow. To trust in the impartiality of Democrat Cleveland to evaluate the policies and actions of Republican Harrison would be like trusting Democrat President William Jefferson Clinton to evaluate evenhandedly the presidency of Republican George H. W. Bush. [See Appendix page 4 paragraph 3]

Paragraph fifteen neglects that President Cleveland urged a restoration of the Hawaiian monarchy for partisan political reasons to discredit the Harrison administration and the Republican Party. [See Appendix page 4 paragraph 3]

Paragraph sixteen notes that the Provisional Government protested President Cleveland's celebration of the Hawaiian monarchy and remained in power. Both actions were morally and legally impeccable, and do not justify an apology.

Paragraph seventeen notes the hearings of the Senate Foreign Relations Committee into the 1893 overthrow; the Provisional Government's defense of Minister Stevens; and its recommendation of annexation. Neither the overthrow, nor Minister Stevens' actions, nor the Provisional Government's annexation recommendation was reproachable or justifies an apology. [See Appendix page 4 paragraphs 2, 3]

Paragraph eighteen notes that a treaty of annexation failed to command a two-thirds Senate majority, an event that does not justify an apology from the United States. The paragraph also falsely declares that the Provisional Government somehow duped the Committee over the role of the United States in the 1893 overthrow, as though the Senators could not think and evaluate for them-

selves. Finally, the paragraph wrongly condemns the overthrow as "illegal." It was no more illegal in the eyes of domestic or international law than the overthrow of the British government in America by the United States in 1776. [See Appendix page 4 paragraphs 2, 3]

Paragraph nineteen notes that the Provisional Government proclaimed itself the Republic of Hawaii on July 4, 1894. The proclamation was legally and otherwise correct. The declaration did not justify an apology by the United States. [See appendix page 4 paragraph 2, 3]

Paragraph twenty declares that on January 24, 1895, the Queen while imprisoned was forced by the Republic of Hawaii to abdicate her throne. The forced abdication was thoroughly defensible. The Queen had not accepted the new dispensation after her overthrow. Thus, she was the equivalent of a Fifth Columnist to the legitimate government of Hawaii until abdication was forthcoming.

Paragraph twenty-one notes that in 1896, President William McKinley replaced Grover Cleveland. That democratic event provided no excuse for an apology.

Paragraph twenty-two notes that on July 7, 1898, in the wake of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii. The annexation was perfectly legal and enlightened. It was no justification for an apology.

Paragraph twenty-three notes that the Newlands Resolution occasioned the cession of sovereignty over the Hawaiian Islands to the United States. That is no cause for an apology. The same occurred in 1845 when Texas was annexed to the United States by joint resolution. The cession in both cases was with the consent of the lawful governments of Hawaii and Texas, respectively.

Paragraph twenty-four notes that the cession included a transfer of crown, government, and public lands without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government. But there is no race-based Native Hawaiian government, either then or previously. The government was for Native Hawaiians and non-Native Hawaiians alike. Further, the Newlands Resolution specified that the revenues of the ceded lands generally "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Compensation was not paid because nothing was taken from the inhabitants of Hawaii. Moreover, the United States assumed over 3.8 million dollars of Hawaii's public debt, largely incurred under the monarchy, after annexation. That debt burden amounts to twice the market value of the land the United States lawfully inherited [See Appendix page 3 paragraph 4]

Paragraph twenty-five notes that Congress ratified the annexation and cession of Hawaii, which required no apology.

Paragraph twenty-six notes that treaties between Hawaii and foreign nations were replaced by treaties between the United States and foreign nations, which is customary under international law when one sovereign replaces another. For example, Russia replaced the Soviet Union in its international treaty obligations following the disintegration of the USSR.

Paragraph twenty-seven notes that the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government, an observation that required no apology.

Paragraph twenty-eight misleads by declaring that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either

through their monarchy or through a plebiscite or referendum." But sovereignty in the Kingdom of Hawaii resided in the monarch, not in the people. Further, the Kingdom was a government for all the inhabitants of Hawaii, not only for Native Hawaiians. Non-Native Hawaiians enjoyed a much inherent sovereignty as Native Hawaiians, and enjoyed an equal claim to national lands. Further, Native Hawaiians overwhelmingly voted for statehood in 1959, which constituted a virtual referendum on United States sovereignty. Finally, neither domestic nor international law recognizes a right to a plebiscite before a transfer of sovereignty. In America, for example, sovereignty was transferred from Great Britain to the United States without a plebiscite or the consent of the British-controlled colonial governments. The Akaka Bill's proponents themselves do not advocate a plebiscite to grant sovereignty to the Native Hawaiian people. [See Appendix page 3 paragraphs 2, 3, 4]

Paragraph twenty-nine notes that on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii. The Act created a representative system of government, a great credit to the United States and far superior to what the residents of Hawaii had previously enjoyed under the Monarchy. [See Appendix page 5 paragraph 1]

Paragraph thirty notes that on August 21, 1959, Hawaii became the 50th State of the United States. But it omits that 94 percent of voters in a plebiscite supported statehood, including an overwhelming majority of Native Hawaiians. In other words, in 1959 Native Hawaiians freely chose the sovereignty of the United States. The elections could have been boycotted if independence were desired. [See, appendix page 5 paragraph 2]

Paragraph thirty-one declares that the health and well-being of Native Hawaiians is intrinsically tied to their deep feelings and attachment to land. But the same can be said of every racial, ethnic, religious, or cultural group. Scarlet O'Hara in *Gone with the Wind* was passionately tied to Tara. Further, the observation does not deny that the United States Constitution scrupulously protects the rights of Native Hawaiians to honor their feelings and attachments to land short of theft or trespass.

Paragraph thirty-two counterfactually declares that long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people. The Native Hawaiian population declined throughout the years of the Kingdom, but, since annexation in 1898, the native population has achieved steady growth. Senator Daniel Inouye himself celebrated the health and prosperity of Hawaiians on the thirty-fifth anniversary of statehood in 1994: "Hawaii remains one of the greatest examples of multiethnic society living in relative peace." Indeed, no fair-minded observer would maintain that Native Hawaiians would have been more prosperous, free, and culturally advanced if foreigners had never appeared in Hawaii and its people remained isolated from the progress of knowledge. The Polynesian nation of Tonga, which had a society and economy strikingly similar to Hawaii's in the 1840s, chose to preserve its Polynesian customs over progress. Today, Hawaii boasts a per capita income twenty times that of Tonga. Moreover, Native Hawaiians would probably have been swallowed up in the wave of Japanese colonialism had they not become citizens of the United States along with non-Native Hawaiians after annexation. [See Appendix page 5 paragraph 2]

Paragraph thirty-three misleads by failing to underscore that the United States Constitution fully protects the determination of

Native Hawaiians to practice and to pass on to future generations their cultural identity. The sole element of cultural identity that the United States cannot and will not tolerate is racial discrimination, whether practiced by whites against blacks during Jim Crow or by Native Hawaiians against non-Native Hawaiians today.

Paragraph thirty-four outlandishly asserts that the Apology Resolution is necessary to promote "racial harmony and cultural understanding." Indeed, the Resolution has yielded the opposite by giving birth to the race-based Akaka Bill. As Senator Inouye acknowledged in 1994, Hawaii stands as a shining example of racial harmony and the success of America's legendary "melting pot." [See Appendix page 5 paragraph 2]

Paragraph thirty-five notes an apology by the President of the United Church of Christ for the denomination's alleged complicity in the illegal overthrow of the Kingdom of Hawaii. But not a crumb of evidence in the Blount report or the Morgan report or Queen Liliuokalani's autobiography substantiates the Church's complicity. Further, the overthrow was as legal as was King Kamehameha's creation of the Kingdom by conquest in 1810 or the overthrow of the British colonial government in America by the United States. Finally, the paragraph is silent on the substance of the "process of reconciliation" between the Church and Native Hawaiians. [See Appendix page 2 paragraphs 1, 2, 3]

Paragraph thirty-six repeats the false indictment of the overthrow of the Kingdom as "illegal." Congress absurdly expresses its "deep regret" to the Native Hawaiian people for bringing them unprecedented prosperity and freedom. As noted above, even Senator Inouye in 1994 conceded the spectacular Hawaiian success story after annexation and statehood. And since the State of Hawaii and Native Hawaiians have never been estranged—Native Hawaiians have invariably enjoyed equal or preferential rights under law—the idea of a need for reconciliation voiced in the paragraph is nonsense on stilts. [See Appendix page 2 paragraph 1]

Section 1, paragraph (1) of the Apology Resolution falsely characterizes the overthrow of the Kingdom of Hawaii as illegal, and falsely insinuates that sovereignty under the Kingdom rested with the Native Hawaiian people to the exclusion of non-Native Hawaiians. As elaborated above, sovereignty rested with the Monarch; and, Native Hawaiians and non-Native Hawaiians were equal in the eyes of the law and popular sovereignty.

Section 1, paragraph (2) ridiculously commends reconciliation where none is needed between the State of Hawaii and the United Church of Christ and Native Hawaiians. [See Appendix page 2 paragraphs 2, 3]

Section 1, paragraph (3) outlandishly apologizes to Native Hawaiians for bringing them the fruits of democracy and free enterprise. It also falsely suggests that Native Hawaiians to the exclusion of non-Natives enjoyed a right to self-determination when in fact all resident citizens of Hawaii were equal under the law.

Section 1, paragraphs (4) and (5) preposterously assert a need for reconciliation between the United States and the Native Hawaiian people when there has never been an estrangement. Indeed, a stunning majority of Native Hawaiians voters supported statehood in 1959 in a plebiscite. [See Appendix page 4 paragraph 3]

#### FLAG BURNING AMENDMENT

Mrs. FEINSTEIN. Mr. President, today, we celebrate Flag Day, honoring an enduring symbol of our democracy, of our shared values, of our allegiance

to justice, and of those who have sacrificed to defend these principles.

On this day, I renew my support for S.J. Res. 12, a resolution that would let the people decide whether they want a constitutional amendment to protect the American flag.

Many moving images of the flag are etched into our Nation's collective conscience. We are all familiar with the image of marines raising the flag on Iwo Jima, with the New York firefighters raising the flag amid the debris of the World Trade Center and with the large flag that hung over the side of the Pentagon while part of it was rebuilt after 9/11.

It is more than a piece of material to so many of us. For our veterans, the flag represents what they fought for—democracy and freedom. Today there are almost 300,000 troops serving overseas, putting their lives on the line every day fighting for the fundamental principles that our flag symbolizes.

Last December, I traveled to Iraq and met with some of the brave men and women in the Armed Forces who are stationed there. We flew out of Baghdad on a C-130 that we shared with a flag-draped coffin being accompanied by a military escort.

This was very moving. It showed clearly how significant the meaning of the flag is and why protecting it is so important.

In the 1989 case *Texas v. Johnson*, the Supreme Court struck down a State law prohibiting the desecration of American flags in a manner that would be offensive to others. The Court held that the prohibition amounted to an impermissible content-based regulation of the first amendment right to free speech. Until this case, 48 of the 50 States had statutes preventing burning or otherwise defacing our flag.

After the *Johnson* case was decided, Congress passed the Flag Protection Act of 1989, which sought to ban flag desecration in a content-neutral way that would withstand judicial scrutiny. Nevertheless, the Supreme Court justices struck down that Federal statute as well.

It is clear that without a constitutional amendment there is no Federal statute protecting the flag which will pass constitutional muster.

S.J. Res. 12 would not ban flag burning. It would not ban flag desecration. This amendment would do one thing only: give Congress the opportunity to construct, deliberately and carefully, precise statutory language that clearly defines the contours of prohibitive conduct.

Some critics say that we are making a choice between trampling on the flag and trampling on the first amendment. I strongly disagree.

Protecting the flag will not prevent people from expressing their points of view. I believe a constitutional amendment returning to our flag the protected status it has had through most of this Nation's history, and that it deserves, is consistent with free speech.

I do not take amending the Constitution lightly. It is serious business and we need to tread carefully. But the Constitution is a living text. In all, it has been amended 27 times.

Securing protection for this powerful symbol of America would be an important, but very limited, change to the Constitution. It is a change that would leave both the flag and free speech safe.

Now it is time to give Americans the opportunity to amend the Constitution for something that we all agree is sacred to so many people all across this country. It is time to let the people decide.

#### COMBATING METHAMPHETAMINE EPIDEMIC

Mr. WYDEN. Mr. President, it is clear that legislation is needed to combat the methamphetamine epidemic sweeping my State and much of the country. This drug is destroying the lives of the people abusing it, their families and their communities. For years, the problem has been talked about, but not enough has been done.

To draw attention to Oregon's meth crisis, my colleague Senator SMITH and I will be periodically coming to the Senate floor to talk about the meth problem in our State.

Today, I would like to introduce a recent newspaper article from the *Oregonian*. The June 1 article describes a police bust of "a massive methamphetamine lab capable of producing 400,000 doses of pure meth at a time—enough to intoxicate the entire adult population of Portland." The bust was one of the largest in Oregon history. This is the good news. The bad news is that this lab had been in business for at least five months—producing and distributing thousands of doses of meth.

Despite successes like this bust, the meth epidemic is getting worse, not better. Congress cannot wait any longer to act—we have a duty to address this crisis now. Enough is enough. It is critical that the Congress pass and the President sign the Combat Meth Act, on which Senator SMITH and I are original cosponsors. We must also fully fund the High Intensity Drug Trafficking Area program and the Byrne Grant program. These initiatives provide much needed reforms and much needed funds, which will help give communities in Oregon and across the Nation the tools they need to fight this terrible problem.

I ask unanimous consent that the full text of the *Oregonian* article be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the *Oregonian*, June 1, 2005]

POLICE BUST METH SUPERLAB

(By Steve Suo)

Oregon police and federal agents have dismantled a massive methamphetamine lab capable of producing 400,000 doses of pure meth at a time—enough to intoxicate the entire adult population of Portland.